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March 7, 1995

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW - Room 222
Washington, DC 20554

Re: Comments of The Freedom Forum First Amendment Center at Vanderbilt University
Review of the Prime Time Access Rule
MM Docket No. 94-123

Dear Mr. Caton:

Enclosed for filing, pursuant to Sections 1.49 and 1.419 of the Commission's rules, are an original and nine copies of the comments of The Freedom Forum First Amendment Center at Vanderbilt University. These comments are being submitted in response to the Commission's Notice of Proposed Rulemaking in MM Docket No. 94-123, Review of the Prime Time Access Rule.

If there are any questions regarding this filing, please communicate with the undersigned counsel.

Respectfully submitted,

HOGAN & HARTSON L.L.P.

By: Robert Corn-Revere
Robert Corn-Revere

Attorneys for The Freedom Forum First Amendment Center at Vanderbilt University

Enclosures

cc: Richard B. Quinn

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
Review of the Prime Time	)	
Access Rule, Section 73.658(k) of the	)	MM Docket No. 94-123
Commission's Rules	)	
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Comments of The Freedom Forum First Amendment Center at Vanderbilt University

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March 7, 1995

Before The
FEDERAL COMMUNICATIONS COMMISSION
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Comments of The Freedom Forum First Amendment Center at Vanderbilt University

The Freedom Forum First Amendment Center at Vanderbilt University ("the First Amendment Center"), pursuant to Section 1.49 of the Commission's Rules hereby submits comments in response to the Commission's Notice of Proposed Rulemaking in MM Docket No. 94-123, Review of the Prime Time Access Rule.

The First Amendment Center is an independent operating program of The Freedom Forum of Arlington, Virginia, a nonpartisan, financially independent foundation dedicated to free press and free speech for all people. The First Amendment Center's mission is to foster a greater public understanding of and appreciation for First Amendment rights and values, including freedom of religion, speech and press, and the right to assemble peaceably and to petition government.

The First Amendment Center has no economic interest in the outcome of this proceeding. The First Amendment Center seeks only to assure that any action taken by the Federal Communications Commission ("FCC") as a result of this inquiry is consistent with the First Amendment.

Brief Introduction

Paragraphs 26 and 58 of the Notice of Proposed Rulemaking indicate that the FCC is well aware that broadcast regulation is a constitutionally sensitive area. Paragraph 58 explicitly states that: "[I]f PTAR is retained in part or in whole, it must be done in a manner consistent with constitutional principles."[1] At the outset, the First Amendment Center wishes to emphasize this point. All rules and enforcement mechanisms adopted and enforced by the Commission must conform to the fundamental restrictions imposed by the First Amendment.

Fred Cate, Senior Fellow in the Annenberg Washington Program in Communication Policy, has articulated the concerns of the First Amendment Center very effectively. According to Cate:

> The First Amendment and the judicial opinions and commentary interpreting it are more than just limits on government action; they reflect principles and aspirations which, while inconsistent and even flawed, offer important guidance for regulation or regulatory forbearance. In short, the First Amendment is central to the information policymaking process not only because compliance with its terms is constitutionally required of every law or regulation emanating from that process, but also because the

[1] In re Review of the Prime Time Access Rule, Notice of Proposed Rulemaking, MM Docket No. 94-123, at 35 (Oct. 25, 1994) [hereinafter NPRM].

> First Amendment, and the discussion surrounding it, contribute something positive and valuable to the process -- a constitutional commitment to free expression and to reaping the benefits of free expression without government interference.[2]

In the comments that follow, the First Amendment Center urges the FCC to recognize that the "scarcity" doctrine on which the constitutionality of PTAR is assumed to rest is no longer a sound constitutional argument. Thus, PTAR in its current form as a content-based and source-based regulation of communicative activity is constitutionally unsound and must be repealed.

I. PTAR in its Current Form is Constitutionally Questionable

A. PTAR regulates on the basis of content and discriminates among classes of speakers.

PTAR restricts the programming discretion of some of the television networks in some communities for certain types of programs at specified times of the day. Such selective regulation of speech is antithetical to basic constitutional principles. The Supreme Court emphasized in Buckley v. Valeo that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[3]

The Court has repeatedly invalidated government regulations that targeted a specified segment of the press for disfavored treatment.[4] The Court

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[2] Fred H. Cate, A Law Antecedent and Paramount, 47 Fed. Comm. L.J. 205, 211 (1994).
[3] 424 U.S. 1, 48-49 (1976) (per curiam).
[4] Differential taxation of different members of the press is especially disfavored. Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221, 229 (1987); Minneapolis Star & Tribune Co. v. Minnesota Commr. of Revenue, 460 U.S. 575, 585 (1983). *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989)

has also unanimously held that selective regulatory burdens are especially pernicious when linked to the content of speech.[5] Especially suspect are measures that focus on "a narrow group to bear fully the burden" of the regulation and which resemble "a penalty for particular speakers or particular ideas."[6] But differential burdens are invalid even where there is no apparent "impermissible or censorial motive" underlying their adoption.[7]

PTAR violates each of these basic principles. It targets only three out of a growing number of broadcasting networks and imposes special restrictions on programming during a viewing-intense time of day.[8] For example, PTAR exempts news broadcasts, documentaries, and public affairs, sports and children's programming from its ban on network programming during the access period.[9] The rule thereby conditions the right of certain network affiliates to broadcast during this access period on their avoidance of entertainment programming. Government imposed content-based distinctions like PTAR are at the heart of what the First Amendment was designed to protect against.

In addition, PTAR restricts the choices that certain local network affiliates can make with regard to the material that is broadcast during prime-time. Affiliates in the top 50 television markets are prohibited from broadcasting programs supplied by the network for a period of one hour out of the four prime-

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(state sales tax exemption for religious publications violates Establishment Clause); Grosjean v. American Press Co., 297 U.S. 233, 248 (1936).

[5] Simon & Schuster, Inc. v. New York Crime Victims Board, 502 U.S. 105 (1991).

[6] Leathers v. Madlock, 499 U.S. 439, 459 (1991).

[7] 460 U.S. 575.

[8] The rule only applies to ABC, NBC and CBS. *See* 47 C.F.R. § 73.658(l)(v).

[9] 47 C.R.F. § 73.658(k).

time hours.[10] As a result, those local stations affected by PTAR's restriction must obtain program material from some source other than their network, regardless of whether the local station would rather broadcast network programming to its viewers during this time.

PTAR discriminates among speakers as well by imposing the restrictions described above on one designated group of local stations while exempting other local stations. Because the rule only applies to the top 50 television markets, network affiliates in smaller markets may chose network or off-network programming during the regulated hour of prime-time, thus allowing all local stations in smaller markets greater autonomy and greater freedom over local programming decisions. Furthermore, stations not affiliated with the targeted networks in the top 50 television markets are free to purchase and air any material from any source during the restricted hour of prime-time.

B. "Scarcity" is no longer a constitutionally adequate justification for the regulation of broadcast communication.

In the absence of an overriding justification, the First Amendment does not permit content-based restrictions on some speakers while leaving other speakers free of regulatory restraint. In the past, PTAR has been upheld in the face of constitutional challenges on the grounds of a scarcity of the spectrum available for broadcast frequencies.[11] That physical broadcast limitation,

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[10] 47 C.R.F. § 73.658(k).

[11] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); *Cf.* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). The scarcity rationale has been used to uphold various content based regulations on the broadcast industry, including PTAR. In Mt. Mansfield Television, Inc. v. F.C.C. 442 F.2d 40, 476-79 (2d Cir. 1971), the Second Circuit Court of Appeals found that PTAR did not violate the First Amendment. The court held the rule to be a "reasonable step toward fulfillment of its fundamental

however, no longer accurately reflects the realities of the modern broadcast universe.

As time passes and technologies evolve, the constitutional significance of a particular characteristic of a given medium must be reevaluated. The Supreme Court emphasized that point last summer in Turner Broadcasting System v. FCC.[12] After basing its First Amendment analysis on the particular characteristics of the cable television market, the Court stated that "given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium."[13] Or, as the U.S. District Court for the Northern District of Illinois noted in Ameritech Corp. v. United States, "[t]he business of . . . video programming has seen rapid technological and economic change in the past ten years. When a statute's constitutionality is predicated on a particular state of facts, that constitutionality "may be challenged [when] those facts have ceased to exist."[14]

Courts have made the same point with respect to broadcasting. The D.C. Circuit, among others, has pointed out that the First Amendment treatment of broadcasters was based on "'the present state of commercially acceptable technology as of 1969."[15] The Supreme Court also recognized that "because

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precepts, for it is the stated purpose of the rule to encourage the '[d]iversity of programs and development of diverse and antagonistic sources of program service.'" Id. at 477. The Second Circuit Court of Appeals barely scrutinized the PTAR because of the precedent set in Red Lion.

[12] 114 S.Ct. 2445 (1994).

[13] 114 S. Ct. at 2457.

[14] 867 F. Supp. 721, 734 (N.D. Ill. 1994).

[15] News America Publishing Co. v. FCC, 844 F.2d 800, 811 (D.C. Cir. 1988), quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. at 389-90. See also Id. at 811 ("The Supreme Court . . . has

the broadcast industry is dynamic in terms of technological change[,] solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."[16] Indeed, the Court has suggested that it would reevaluate the constitutional status of broadcasting if it received "some signal" from the FCC that facts supporting the older doctrine had changed.[17]

The Commission itself has recognized the flaw in continued reliance on the scarcity rationale. It has indicated that spectrum scarcity is rapidly disappearing.[18] In fact, by eliminating the fairness doctrine, the Commission has recognized that the scarcity doctrine can no longer be used to regulate the content of broadcast television.[19]

The constitutional landscape has radically changed since the scarcity rationale was first enunciated in Red Lion. When PTAR was adopted in 1970, the broadcast television industry was dominated by three major television networks.[20] In 1975, the networks collectively attained 93 percent of the prime-time viewing audience. The networks now obtain about 61 percent.[21]

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recognized that technology may render the [scarcity] doctrine obsolete - indeed, may have already done so."); Meredith Corp. v. FCC, 809 F.2d 863, 867 (D.C. Cir. 1987); Forbes v. Arkansas Educational Television Communication Network Found., 22 F.3d 1423 (8th Cir. 1994) (en banc) (McMillan, J., concurring in part and dissenting in part); Arkansas AFL-CIO v. FCC, 11 F.3d 1430 (8th Cir. 1993) (en banc) (Arnold, C.J., concurring); Telecommunications Research and Action Center v. FCC, 801 F.2d 501, 506-09 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987); Loveday v. FCC, 707 F.2d 1443, 1459 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1008 (1984).

[16] CBS, Inc. v. Democratic National Committee, 412 U.S. 94, 102 (1973).

[17] FCC v. League of Women Voter in California, 468 U.S. 364, 376-77 n. 11 (1984)

[18] *See* Syracuse Peace Council v. WTVH, 2 F.C.C. Rcd. 5043 (1987), *aff'd*, 867 F.2d 654 (D.C.Cir. 1989), *cert. denied*, 493 U.S. 1019, 110 S. Ct. 717, 107 L.Ed.2d 737 (1990); Fairness Doctrine Obligations of Broadcast Licenses, 102 F.C.C. 2d 143 (1985).

[19] Fairness Doctrine Obligations of Broadcast Licenses, 102 F.C.C. 2d 143 (1985).

[20] NPRM at 9.

[21] NPRM at 14.

The total number of broadcast television stations has increased by 76 percent, from 862 stations in 1970 to 1,520 stations as of September 30, 1994.[22] In 1970, 65 percent of television households received 6 or more broadcast channels. In 1993, 70 percent of all broadcast television households received 11 or more over-the-air channels.[23]

In 1970 there were three national television networks. Today, Fox has emerged as a fourth network and two new networks, United Paramount and Warner Brothers, have begun operations. New video distribution services have greatly expanded as well. Since the 1970's, cable television has evolved to become a major competitor of broadcast television. In 1975, only 13.2 percent of television households subscribed to cable, compared to 62.5 percent today.[24] On average, cable subscribers receive 39 channels.[25]

Other forms of video distribution are making great inroads into the video marketplace. By June 1994, 550,000 subscribers received wireless cable.[26] Satellite Master Antenna Systems now serve about one million subscribers.[27] In 1970, VCRs were unavailable. Today, over 77 percent of households own VCRs.[28]

Other technologies have also begun to emerge. Direct Broadcast Satellite service is expected to serve one million customers by the Summer of

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[22] NPRM at 10.
[23] NPRM at 10.
[24] NPRM at 11.
[25] NPRM at 10.
[26] NPRM at 11.
[27] NPRM at 11.
[28] NPRM at 11-12.

1995.[29] This leaves only 30 percent of the population which relies exclusively on over-the-air broadcast channels.[30] Bandwidth scarcity, therefore, is no longer sufficient justification for content-based restrictions because an overwhelming majority of Americans receive television programming by means other than over-the-air broadcasting. Furthermore, those viewers who continue to rely on broadcast television have many more channels to choose from than in 1970 when PTAR was adopted.

To whatever extent it may still be thought to exist, scarcity is not what it once was as a constitutional defense. When PTAR was adopted, courts afforded much greater deference to the Commission when reviewing FCC programming regulations than the courts generally do now. For example, in Mt. Mansfield Television, Inc. v. FCC, in which the Second Circuit upheld PTAR's constitutionality, the court essentially echoed the Red Lion conclusion that broadcast programming could be regulated at will so long as it was done in the name of diversity.[31] Recently, however, the Supreme Court has emphasized the government's limited role in regulating broadcast content. In Turner Broadcasting System the Court recognized that:

> ...[T]he FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although 'the Commission may inquire of

[29] NPRM at 12.
[30] NPRM at 31 n. 90.
[31] 442 F.2d at 476-79.

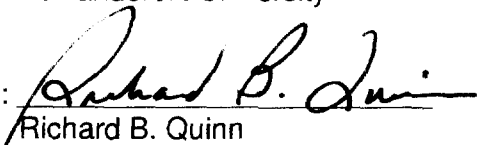
> licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.[32]

Conclusion

The changing nature of the television industry coupled with a decreasing tolerance of the scarcity rationale by the courts require a rethinking and reevaluation of the wisdom and constitutionality of content-based and source-based restrictions such as PTAR. Stated simply, scarcity is no longer a constitutionally sufficient reason for such regulations. In the absence of scarcity or a lack of diversity in the television marketplace, the Commission must abandon its efforts to regulate television program content and source. Assuming that the Commission abandons the scarcity rationale but that it continues to regulate access programming, all future regulations in the broadcast market must conform to the fundamental restrictions imposed by the First Amendment.

Respectfully submitted,

The Freedom Forum First Amendment Center
At Vanderbilt University

By: 
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March 7, 1995

[32] 114 S.Ct. at 2463, *quoting* En Banc Programming Inquiry, 44 F.C.C.2d 2303, 2312 (1960).